

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
March 20, 2007 Session

STATE OF TENNESSEE v. PATRICK C. SLAY

**Direct Appeal from the Criminal Court for Davidson County
No. 2004-A-16 Cheryl A. Blackburn, Judge**

No. M2006-02114-CCA-R3-CD - Filed June 27, 2007

Following a jury trial, Defendant, Patrick C. Slay, was convicted of driving under the influence of alcohol. The trial court suspended Defendant's driver's license for one year, ordered Defendant to attend an alcohol and drug treatment program, and sentenced him to 11 months, 29 days, with all suspended except 48 hours, and the balance served on probation. Defendant filed a motion for new trial which the trial court subsequently denied. On appeal, Defendant argues that the trial court erred in denying his motion for new trial because the trial court erred in admitting testimony that the Intoxilyzer 1400 (BAC machine) was working properly at the time of the arrest. After a review of the record, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and J. C. McLIN, J. joined.

C. Edward Fowlkes, Nashville, Tennessee, for the appellant Patrick C. Slay.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Victor Johnson III, District Attorney General; and Matthew Pietsch, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

On December 7, 2002, Officer Kevin Lovell, of the Metro Nashville Police Department, was on duty as part of a D.U.I. enforcement team when he observed a vehicle exceeding the posted speed limit. Officer Lovell followed the vehicle, and after pacing the vehicle at sixty miles per hour in a thirty-five-mile per hour zone, he stopped the vehicle for speeding. When he approached the vehicle to speak with the driver, he noticed the driver had red and watery eyes, he had slurred speech, and "fumbled a little bit" while retrieving his license. Officer Lovell also smelled the odor of alcohol

and asked the driver, Defendant, if he had been drinking. Defendant said no and agreed to participate in some field sobriety tests at Officer Lovell's request.

Officer Lovell conducted the "horizontal gaze, the one-leg stand, and the nine-step walk-and-turn" sobriety tests. During each of the tests, Defendant showed several indicators that he was impaired and unable to drive a vehicle. Defendant then consented to take a breath test. Officer Lovell administered the test using the Intoxilyzer 1400, a machine approved for administering breath tests in Tennessee. Officer Lovell testified that he was trained and certified to operate the machine in accordance with the standards set forth by the Tennessee Bureau of Investigation ("T.B.I.") Forensic Services Division, and he administered the test to Defendant in accordance with these standards. A copy of the officer's Certificate of Completion for the Intoxilyzer 1400 operation class was introduced as an exhibit. Officer Lovell further testified that the machine had been tested regularly by the T.B.I. to ensure its accuracy and proper functioning. He verified documents which showed the T.B.I. certified the instrument and tested its accuracy on September 30, 2002, and recertified the instrument on December 27, 2002. Each test showed the machine was functioning properly and generating accurate results. Officer Lovell noted that T.B.I. procedure required the machine to be recertified every 90 days.

Officer Lovell said he had conducted in excess of one hundred breath tests using the machine and then explained the procedure for conducting a test. He explained that the machine was given a "wet bath" or simulated breath test at the beginning of each shift to make sure the machine was functioning properly. The "wet bath" was conducted on the night of Defendant's arrest and the machine was functioning properly. Officer Lovell further explained that standard T.B.I. operating procedure required an officer to wait twenty minutes prior to administering a breath test to ensure no foreign objects such as vomit, smoke, or mouth alcohol are in the individual's mouth. Such items might skew the accuracy of the test or cause the test to abort. Officer Lovell testified that he waited the required twenty minutes before administering the test to Defendant and did not observe any foreign objects in Defendant's mouth. Following the test, the machine indicated that Defendant had a blood alcohol content of .164 percent. Officer Lovell identified the printout from the Intoxilyzer 1400 which showed Defendant's blood alcohol content. The printout was admitted into evidence.

II. Analysis

On appeal, Defendant raises the issue of whether an officer, properly qualified under *Sensing*, may offer proof as to whether a breath test machine was properly functioning at the time a breath test was administered. Defendant argues that such testimony is opinion testimony governed by Tennessee Rules of Evidence 701(a), 702, and 703, and the trial court erred in admitting such testimony from Officer Lovell without first qualifying the officer as an expert. Specifically, Defendant objects to the following testimony from Officer Lovell:

Q: And can you tell the jury how you operate that instrument?

[Officer Lovell]: We come into work every night, we will wet bath it or [give it] a simulated breath test to make sure the machine is functioning properly.

....

Q: Now you said that you performed what you call the wet bath?

[Officer Lovell]: Yes, sir.

Q: Every day. What was the purpose of that?

[Officer Lovell]: The wet bath is to make sure the machine is functioning properly, make sure it is giving accurate readings. The solution we had was a .10 simulation, so it was - -

Q: So explain why - -

[Defense Counsel]: Objection. Is there any evidence of this? Hearsay.

THE COURT: Overruled.

[Defense Counsel]: The wet bath?

THE COURT: Overruled. Yes. Go ahead.

Q: Are you the one that performed that?

[Officer Lovell]: I performed it on my machine, yes.

Q: And can you explain one more time exactly what the purpose of using that solution was?

[Officer Lovell]: To use the wet bath solution is to make sure that the machine is functioning properly and make sure it is not having any errors, make sure the date and time is correct, and make sure that when it does give a test, it is giving an accurate test.

Q: And you stated that you do that everyday [sic] you use that instrument?

[Officer Lovell]: Every day we go into work, before we start our shift, we will wet bath the machine.

Q: And did you do that on December 7, 2002?

[Officer Lovell]: I did.

Q: And was it working properly?

[Officer Lovell]: Yes, sir.

. . . .

Q: And if a foreign object was in the mouth, what impact would that have on the test?

[Officer Lovell]: It could either alter the test or abort the test.

Q: And are there safeguards in the machine that would - -

[Defense Counsel]: Objection. Qualifications, unless they can qualify him - -

. . . .

Q: Officer , have you been trained in how the machine functions?

[Officer Lovell]: Not the internal, not the specific internal function of it, no.

Q: Have you been trained in terms of how to operate the machine?

[Officer Lovell]: Yes.

. . . .

Q: And what, to your knowledge, is the machine going to do if there were mouth alcohol?

[Officer Lovell]: It would abort.

[Defense Counsel]: Objection.

Defendant contends that this is a matter of first impression and there is no reported case in which an officer was allowed to testify, over objection, in regard to the working of a breath testing machine or wet bath procedure. Defendant further contends that it is a violation of his confrontation

rights to allow an officer to testify about *what* a breath test machine does without requiring the officer to explain *how* the machine does it. With respect to the latter issue, Defendant failed to object on grounds of a confrontation violation at trial and has therefore waived this issue on appeal. Tenn. R. Evid. 103(a)(1).

In *State v. Sensing*, 843 S.W.2d 412, 416 (Tenn. 1992), our supreme court addressed the issue of what foundation must be laid for the admission of evidentiary breath test results. The court held that, “it is no longer necessary for a certified operator of an evidentiary breath testing instrument to know the scientific technology involved in the function of the machine” in order for the operator’s testimony to be admissible. *Id.* The court explained that the average law enforcement officer does not have the technical training necessary to qualify him or her as an expert in the science behind the conversion of breath alcohol content to blood alcohol content or in the manner in which the breath test machine conducts this function. *Id.* The court further explained that breath test machines had become an accepted method in the scientific community for testing blood alcohol content, and in those circumstances where understanding the function of the machine was necessary for a determination of the case, expert testimony and the records of the scientific testing of the machine were readily available for examination. *Id.* The court then set forth several factors for the trial court to use in determining the admissibility of an officer’s testimony as it pertains to a breath test.

Under the *Sensing* factors, an officer’s testimony regarding breath test results is admissible evidence so long as the officer is able to testify (1) that the tests were performed in accordance with the standards and operating procedure promulgated by the forensic services division of the Tennessee Bureau of Investigation, (2) that he was properly certified in accordance with those standards, (3) that the evidentiary breath testing instrument used to administer the test was certified by the forensic services division, was tested regularly for accuracy, and was working properly when the breath test was performed, (4) that the motorist was observed for the requisite 20 minutes prior to the test, and during this period, the motorist did not have foreign matter in his mouth, did not consume any alcoholic beverage, smoke, or regurgitate, (5) that the officer followed the prescribed operational procedure, and (6) that he can identify the printout record offered in evidence as the result of the test given to the person tested. *Id.* at 416.

Applying the *Sensing* factors to the facts of this case, it is clear that the breath test results were properly admitted into evidence. The proof showed that Officer Lovell administered a breath test to Defendant using the Intoxilyzer 1400. Officer Lovell testified that the Intoxilyzer 1400 was certified by the T.B.I. Forensic Services Division, that he was properly trained and certified to operate the Intoxilyzer 1400 in accordance with the T.B.I. Forensic Services Division standards, and that he administered the breath test to Defendant using those prescribed standards and operating procedures. Officer Lovell further testified that a “wet bath” or simulated breath test was performed on the machine each day to verify that the machine was functioning properly. The wet bath test performed on the day of Defendant’s breath test indicated the machine was accurate and working properly. Additionally, documents were introduced to show that the T.B.I. certified the instrument and tested its accuracy on September 30, 2002, and recertified the instrument on December 27, 2002. On both occasions, the machine was functioning properly. Finally, Officer Lovell testified that he

observed Defendant for the requisite 20- minute period prior to administering the test and determined that Defendant did not have anything in his mouth that would affect the accuracy of the test. The breath test machine indicated that Defendant had a blood alcohol content of .164 percent. A printout from the Intoxilyzer 1400 which showed Defendant's blood alcohol content was identified by Officer Lovell and admitted into evidence.

The officer's testimony satisfied each of the requisite *Sensing* factors for admission of the breath test results into evidence. We see nothing in the testimony Defendant objects to which required expert testimony in addition to the officer's testimony. Further, Defendant presented no evidence to challenge the accuracy of the Intoxilyzer 1400, the qualifications of the officer to operate the machine, or the procedures the officer used in administering the test. Thus, the trial court properly admitted the breath test results into evidence. Accordingly, Defendant is not entitled to relief.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed.

THOMAS T. WOODALL, JUDGE